SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6509

FRANK MIDDLETON,

Petitioner,

-versus-

STATE OF SOUTH CAROLINA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner herein, pursuant to his Affidavit, would move before this Court to be allowed to proceed in forma pauperis, pursuant to Supreme Court Rule 53(1) and 29 U.S.C. Section 1915.

GIBBS, GAILLARD, ROWELL & TANENBAUM

BY _____
COMING B. GIBBS, JR.

BY _____
MARK C. TANENBAUM

BY _____
A. HOYT ROWELL, III
Attorneys for Petitioner
122 King Street, P. O. Box 659
Charleston, South Carolina 29402

March 31st, 1976.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6509

FRANK MIDDLETON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

GIBBS, GAILLARD, ROWELL & TANENBAUM
122 King Street
Charleston, South Carolina

Attorneys for Petitioner

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75-6509

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

PERSONALLY appeared before me, Frank Middleton, who, being duly sworn, deposes and says:

That he is twenty-eight years of age and presently incarcerated in the Central Correctional Institute, a prison facility maintained by the State of South Carolina;

That he owns no real or personal property worth more than Five Hundred ($500.00) Dollars;

That his only source of income is from whatever work he can obtain within the prison system of the State of South Carolina, which he must use to purchase the necessities of life;

That he is unable to pay the costs for the prosecution of this Petition for Writ of Certiorari or the other fees and costs involved herein, and unable to give security therefor;

Further, affiant believes that he has been deprived of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and is entitled to redress therefor.

X Frank Middleton
Frank Middleton

SWORN to before me this 23 day of March, 1976.

Edsan B Wiggins (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires July 31, 1980

INDEX

CITATIONS

Cases:

Other References

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO._____

FRANK MIDDLETON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the South Carolina Supreme Court rendered in this case.

OPINIONS BELOW

The sentences imposed by the Court of General Sessions of Charleston County for the Ninth Judicial Circuit of the State of South Carolina are unreported. The opinion of the South Carolina Supreme Court is reported at _____ South Carolina _____, _____ Southeastern 2d _____ (1976) and is printed in the appendix, infra, pp. 10.

JURISDICTION

The decision of the South Carolina Supreme Court in this case was dated and entered on February 26, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW

Was it proper for the State Trial Court to allow the State to introduce in its case in chief, as evidence of guilt, the refusal of the Petitioner to consent to a search of his person, when he was not under arrest, had been advised of his Constitutional rights under the *Miranda* decision, and had been advised by the police officers proposing to conduct said search that he did not have to submit to the search?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, thereof:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Jurisdiction was had in this case in the Court of General Sessions of Charleston County for the Ninth Judicial Circuit of the State of South Carolina, upon two indictments charging rape and armed robbery, violations of Section 16-71 of the Code of Laws of South Carolina for 1962, as amended, and Section 16-333 of the Code of Laws of South Carolina for 1962, as amended.

The Petitioner was tried and convicted by a jury upon the two indictments which were consolidated for trial. The sentences were twenty-five years for armed robbery and forty years for rape, concurrently, the maximum on each indictment.

On July 27th, 1974, during the evening hours, an armed robbery occurred at a drive-in theater in the suburbs of Charleston, South Carolina, and a woman hostage was taken and subsequently raped by the person committing the armed robbery. Shortly after the incident took place, police officers converged on the home of the Petitioner herein and requested that he accompany them to the police station. The Petitioner complied.

Upon arriving at the Police Station, the Petitioner was given his *Miranda* warnings by a police officer and subjected to questioning concerning his whereabouts that

evening. At that point he was asked to submit to a combing of his pubic area, the admitted purpose of this combing to be a search for pubic hairs of the victim. After consenting to this search, the Petitioner, a black man, accompanied a white detective towards the men's room where the combing was to take place. While in route he was approached by the detective who had earlier given him his *Miranda* warnings, and was told by both police officers that he was not being charged with a crime and that he did not have to submit to the combing if he did not wish to do so. The Petitioner at that point asserted his right to refuse to consent to the search and went home.

The following day, the police officers in charge of the investigation of the case went before a Magistrate to request a Search Warrant to search the home of the Petitioner for fruits of the crime and evidence but the Magistrate refused to issue the Search Warrant on the basis of lack of probable cause. Later that day, the Petitioner was arrested and incarcerated, and was held by the police in custody until the date of the trial.

During the State's case in chief, the State, over the objections of the Petitioner on the basis of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, introduced into evidence the Petitioner's refusal to submit to the consent search of his pubic area.

After conviction in the Court of General Sessions, an appeal was made to the Supreme Court for the State of South Carolina which held that the introduction of this evidence was not invalid and affirmed the General Sessions Court.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of South Carolina is not in accord with the applicable decisions of this Court.

The decision of the Supreme Court of South Carolina below is in conflict with a series of decisions of this Court holding that the introduction into evidence by the State, in its case in chief, as evidence of guilt of an accused, of that accused person's invocation of his Fifth Amendment rights not to incriminate himself, is impermissible. *Miranda v. State of Arizona*, 384 U.S. 436; *Schmerber v. State of California*, 384 U.S. 757; *Malloy v. Hogan*, 378 U.S. 1.

In *Malloy, supra*, this Court held that the Fifth Amendment's exception from compulsory self-incrimination is protected by the Fourteenth Amendment against abridgement by the States. The precise issue here, the constitutional permissibility of the State's use, to prove guilt, of invocation of the Fifth Amendment privilege, was addressed but not decided by this Court in the case of *Schmerber, supra*. In *Schmerber*, this Court held that the withdrawal of a blood sample from the body of the defendant, and its introduction into evidence against the defendant, who was accused of a criminal offense of driving an automobile while under the influence of intoxicating liquor, did not violate the accused person's privilege against self-incrimination in that the Fifth Amendment applies only to evidence which may be termed "testimonial" or "communicative." However, the Court in *Schmerber*, did indicate that the use of an accused's refusal to submit to a bodily search as evidence of his guilt, as opposed to the introduction into evidence of the results of physical tests, would be governed by the Fifth Amendment, since such a refusal is the kind of evidence which may be classified as "testimonial" or "communicative". After concluding that the results of the blood tests in *Schmerber* did not constitute communicative, testimonial evidence because Schmerber's testimonial capacities were in no way implicated, this Court noted:

> "This conclusion would not necessarily govern had the state tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer a confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. ...
>
> "[The] petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introcution of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona*, 384 U.S. at p. 468, n. 37, 86 S.Ct. 1624. Since trial here was conducted after our decision in *Malloy v. Hogan, supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements. ..." *Schmerber v. State of California*, 384 U.S. at 765, n.9.

It is clear that in this case, unlike the factual circumstances in *Schmerber, supra*, the Petitioner's testimonial capacities were implicated. What is objected to as being constitutionally impermissible is not the introduction into evidence of the results of a physical test or search, since no search was conducted in this case, but rather the use by the State, to prove guilt, of the Petitioner's testimonial, communicative act of refusal to consent to the search, where consent was a necessity. In such a circumstance, the Court's decision in *Schmerber, supra*, clearly indicates that *Miranda, supra*, would be controlling.

In that portion of the *Miranda* decision cited in *Schmerber, supra*, this Court, after finding that the accused must be informed in clear and unequivocal terms that he has a right to remain silent in order to dispel not only the impression that the interrogation would continue indefinitely until a confession is obtained, but also the notion that silence in the face of accusation would be damaging to the accused, noted:

> "...In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at the trial the fact that he stood mute or claimed his privilege in the face of such accusation. ..." *Miranda v. State of Arizona*, 384 U.S. 468, n. 37, 86 S.Ct. at 1625 (citations omitted).

The Supreme Court of South Carolina, in its decision below, bottomed its finding upon two premises. First, there was no authority which requires the exclusion of testimony of Petitioner's refusal to submit to a test based upon the Fifth Amendment, and thus the South Carolina cases of *State v. Smith*,

230 S.C. 164, 94 S.E.2d 886 (1956), and *State v. Miller*, 257 S.C. 213, 185 S.E.2d 359 (1971), which held that the introduction into evidence of the refusal to submit to a breathalyzer test did not violate the defendant's privilege against self-incrimination, would be controlling. Secondly, the Court found that this Court's decision in *United States v. Hale*, ____ U.S. ____, 95 S.Ct. 2133 (1975), in which this Court held it was reversible error to allow the prosecution to introduce into evidence a defendant's silence prior to trial, was decided on evidentiary, non-constitutional grounds, inapplicable to state courts, and thus would not be controlling in Petitioner's case. As to the first of these propositions, the Petitioner would submit that the South Carolina Supreme Court's holding in this case, and its reliance therein on the aforenoted *Smith* and *Miller* decisions, is clearly at variance with this Court's holdings in the above quoted portions of *Miranda, supra*, and *Schmerber, supra*. Additionally, as to the latter proposition, while the majority opinion in *Hale, supra*, was based upon non-constitutional grounds, the Court explicitly recognized that the evidentiary problem in *Hale, supra*, contained "grave constitutional overtones." *Hale, supra*, ____ U.S. ____, 95 S.Ct. 2133 at 2138, n. 7. This Court in *Hale, supra*, did not reach the constitutional issue, since *Hale, supra*, being a case of Federal origin, was decided on the basis of this Court's supervisory authority over lower Federal Courts.

In summation, the precise issue involved in the instant Petition is whether the Fifth Amendment prevents the State in a criminal proceeding from introducing into evidence, in the State's case in chief, as proof of guilt, the refusal of the Petitioner to submit to a search. The

Petitioner submits that *Malloy, supra*, and its progeny, *Schmerber, supra*, and *Miranda, supra*, forbid the introduction of such evidence based upon the Fifth Amendment. Should the Court deny this Petition, then, on account of this Court's holding in *Hale, supra*, an incongruous situation would arise wherein persons in State Court criminal proceedings would be accorded lesser rights under the Fifth Amendment than persons in Federal criminal proceedings; a result completely at odds with the decisions of this Court, beginning with *Malloy, supra*, which have applied the protection of the Fifth Amendment as against the states with full force and effect.

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GIBBS, GAILLARD, ROWELL & TANENBAUM

BY _____
COMING B. GIBBS, JR.

BY _____
MARK C. TANENBAUM

BY _____
A. HOYT ROWELL, III

Attorneys for Petitioner

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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-6509

FRANK MIDDLETON, Petitioner,

versus

THE STATE OF SOUTH CAROLINA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
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JOSEPH C. COLEMAN
Deputy Attorney General

JOSEPH R. BARKER
Assistant Attorney General

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at ___S.C.___, 222 S.E. 2d 763 (1976) and is set out in Appendix of Petition.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Whether the admission of testimony establishing the Petitioner's refusal to consent to a search of his person constitutes a violation of his Fifth Amendment privilege against self-incrimination?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, thereof:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The entire Transcript of the proceedings below are set out at the end of this Brief. All references are thereto.

The Petitioner, Frank Middleton, was indicted for rape and armed robbery at the September, 1974, term of General Sessions Court for Charleston County (Tr., Statement).

The matter came to trial on December 10, 1974, and the issue this Petitioner concerns was raised during the direct examination of Detective Conklin, one of the investigating officers (Tr., p. 160, line 3; p. 193, line 25; p. 226, line 18).

At one point during that examination, the Solicitor asked Conklin if the latter had requested combings from the pubic area of the Petitioner. Counsel for the Petitioner objected, the jury was excused, and a full hearing was held on the matter. (Tr. p. 196, lines 7-19) In the absence of the jury, the Solicitor elicited testimony from Conklin to the effect that he had requested the Petitioner to submit to combing of his pubic area and that, at first, the Petitioner had consented. Subsequently, immediately before the actual combing, the Petitioner changed his mind and refused. (Tr. p. 196, line 20-p. 198, line 24) Counsel for the Petitioner then cross-examined Conklin. (Tr. p. 199, line 1-p. 203, line 25) At the close of Conklin's testimony at this hearing, counsel for the Petitioner objected to the inclusion of this testimony on the basis of the Fifth and Sixth Amendments. (Tr. p. 204, line 10-p. 206, line 22; p. 208, line 11-p. 209, line 12) After a rather lengthy argument, the trial court overruled the objection and the jury returned. (Tr. p. 209, lines 13-17)

Shortly after the Solicitor's examination of Conklin resumed, counsel for the Appellant made mention of the Fourth Amendment to the trial court. He later moved for a mistrial based upon the argument that the trial court's ruling that this testimony was admissible resulted in a violation of Appellant's Fourth Amendment rights. That motion was denied. (Tr. p. 256, line 12-p. 258, line 17)

The Petitioner was convicted and sentenced to prison terms of 25 and 40 years respectively for armed robbery and rape, to run concurrently.

ARGUMENT

I.

In his appeal to the South Carolina Supreme Court Petitioner sought reversal on both Fourth and Fifth Amendment grounds. Indeed much greater emphasis was placed upon the Fourth Amendment than upon the Fifth in his Briefs and arguments before the lower court. Nevertheless, in his Petition before this Court, he abandons his Fourth Amendment arguments and relies exclusively on what he alleges to be a violation of the Fifth Amendment privilege against self-incrimination. As a result, and because Appellant's Fourth Amendment contentions were without merit as shown in Respondent's Brief before the South Carolina Supreme Court, said Brief being attached hereto, the Respondent will address itself solely to the Fifth Amendment issue.

It is Respondent's position that Petitioner's Fifth Amendment guarantee against self-incrimination was in no way violated by the admission of the objected-to testimony. In support of that position, Respondent will rely upon the so-called "California Doctrine" on this issue as set down by Chief Justice Traynor in his opinion in People v. Ellis, 55 Cal. Rptr. 385, 421 P. 2d 393. The Ellis case has been cited with approval on this issue in Newhouse v. Misterly, 415 F. 2d 514 (9th Cir. 1969); Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, 691; State v. Suddeth, 55 Cal. Rptr. 393, 421 P. 2d 402; State v. Haze, 218 Kan. 60, 542 P. 2d 720; Coleman v. State, 211 So. 2d 924 (Ala. 1968); State v. Andrews, 212 N.W. 2d 868 (Minn. 1973); Commonwealth v. Robinson, 229 Pa. Super. 131, 324 A. 2d 449; City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E. 2d 41; and State v. McGrew, 25 Ohio App. 2d 175, 268 N.E. 2d 291. The decisions of many other courts have agreed with Ellis without specific citation thereto, U.S. v. Stembridge, 477 F. 2d 874 (5th Cir. 1973); State v. Cary, 49 N.J. 343, 230 A. 2d 384; U.S. v. Parkins, 424 F. 2d 152 (9th Cir. 1970); Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970); City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W. 2d 314; State v. Holt, 261 Iowa 1089, 156 N.W. 2d 884, and Ellis also is in harmony with the pre-Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. 2d 908, majority, 87 A.L.R. 2d 370, 378.

Initially, it is necessary to examine the scope of the Fifth Amendment privilege. It is well-established that the privilege applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him. Schmerber, supra. 348 U.S., at 764.

It is equally well established that the accused cannot be penalized for exercising his Fifth Amendment privilege when under police custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 468, 86 S.Ct. 1602, 1625, 16 L. Ed. 2d 694. To rule otherwise would be to limit the privilege by making its assertion costly. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 1232, 14 L. Ed. 2d 106.

Respondent contends, however, that the foregoing rule has no application to the instant case because the Petitioner's refusal to permit the search of his pubic area was not "a communication or testimony" of the accused within the meaning of Schmerber. Rather, it was circumstantial evidence of consciousness of guilt. The admission of such evidence, like evidence of an escape from custody, fake alibi, flight, suppression of evidence, etc., does not violate the privilege. It should also be noted, as Chief Justice Traynor does at 421 P. 2d 397, that this evidence did not result from a situation contrived to produce conduct indicative of guilt, like, for example, a polygraph test. Schmerber, 384 U.S., at 764. Instead, the police were seeking to obtain positive probative evidence and the Petitioner's conduct was merely incident to their efforts. Police abuse is very unlikely in this type of situation.

The distinction between Petitioner's refusal and the "communication or testimony" referred to in Schmerber is clarified in the following statement by Chief Justice Traynor:

> Although conduct indicating consciousness of guilt is often described as an "admission by conduct," such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind. Ellis, supra, 421 P. 2d, at 397-398.

Concerning that distinction, Wigmore stresses that in criminal cases guilty conduct on the part of an accused is evidence in which the "circumstantial nature of the inference strongly dominates the testimonial aspect..." 2 Wigmore, Evidence (3d ed. 1940) Section 267, at p. 94.

Traynor goes on to orate, at 421 P. 2d, 398, fn. 12, that:

> The inferential chain here is no different from that which makes any event that does not directly illuminate the circumstances of the crime charged a relevant fact. The trier of fact must reason from, for example, an escape from jail, to a consciousness of guilt that would motivate the escapee's conduct, and, from that premise, to the conclusion that such conduct is relevant to the ultimate issue of guilt or innocence. The key factor is that no testimony of an accused, or other equivalent intended to communicate knowledge, such as a writing, sign language, or a demonstration, forms the basis for the inferential chain. Ellis, 421 P. 2d, at 398.

Petitioner relies heavily on the following language from Schmerber as support for the proposition that his refusal constituted a "testimonial product" within the meaning of that decision (Petition, pp. 5-7):

> "This conclusion would not necessarily govern had the state tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer a confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case....
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> "[The] petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. We think general Fifth Amendment principles, rather than the particular holding of Griffin, would be applicable in these circumstances, see Miranda v. Arizona, 384 U.S. at p. 468, n. 37, 86 S. Ct. 1624. Since trial here was conducted after our decision in Malloy v. Hogan, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements...." Schmerber v. State of California, 384 U.S. at 765, n. 9.

Respondent respectfully contends that Petitioner's reliance on the foregoing language is misplaced. This language reflects the Court's concern that coercive pressures, even unintended, might encroach upon the privilege. It is simply a recognition that the fear induced by the prospect of the actual taking of the physical evidence, especially if the process of the taking was likely to be painful such as the blood test in Schmerber, might itself produce a coercive device for eliciting a "testimonial product" of an incriminating nature. Respondent recognizes that such a product would be privileged under the Fifth Amendment, however, such considerations do not apply to the instant case, because, as established hereinabove, the inferences flowing from Appellant's refusal do not constitute a "testimonial product."

From the foregoing, it is clear that the admission of evidence establishing Petitioner's refusal to permit a combing of his pubic area was in

no way violative of his Fifth Amendment guarantee against self-incrimination. It is also clear that the decisions of the South Carolina Supreme Court on this point are not in conflict with those of this Court. State v. Smith, 230 S.C. 164, 94 S.E. 2d 886; State v. Green, 227 S.C. 1, 86 S.E. 2d 598; State v. Miller, 257 S.C. 213, 185 S.E. 2d 359.

CONCLUSION

For the foregoing reason, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

JOSEPH C. COLEMAN
Deputy Attorney General

JOSEPH R. BARKER
Assistant Attorney General